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No. 92-3-256

In the Supreme Court of the United States of America

OCTOBER TERM, 1992

ROBERT E. DAVIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. What is the appropriate significance to be accorded to a predicate state law offense under the Travel Act?

2. What is the correct *mens rea* standard for conviction under the Travel Act?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Robert E. Davis and Respondent United States of America.

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No. 92-3-256

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ROBERT E. DAVIS,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Petitioner Robert E. Davis respectfully prays that the Court issue a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on May 5, 1992 and July 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported as *United States v. Davis*, 965 F.2d 804 (10th Cir.

1992). The Tenth Circuit's order denying Petitioner's Petition for Rehearing With Suggestion for Rehearing *En Banc* and modifying the Court's original opinion is styled *United States v. Davis*, No. 91-8008 (10th Cir. July 7, 1992). The opinions are reproduced in Appendices A and B, respectively, to this Petition.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion and judgment on May 5, 1992. Petitioner timely filed a Petition for Rehearing on May 18, 1992. The Petition for Rehearing was denied on July 7, 1992. In an order dated September 25, 1992, this Court granted Petitioner until November 4, 1992, to file this Petition. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C § 1254(1).

STATUTES INVOLVED

A. **The Travel Act**. 18 U.S.C. § 1952, entitled Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises (hereinafter, the "Travel Act"). The Travel Act is reproduced in Appendix C to this Petition.

B. **The Wyoming Bribery Statute**. Wyo. Stat. § 6-5-102 (1977). This statute is reproduced in Appendix D to this Petition.

STATEMENT OF THE CASE

Petitioner was one of several member underwriters of Lloyd's U.S., a Texas insurance association. Petitioner's business was not, and never has been, regulated by any Wyoming agency. In April, 1987, Petitioner, who resided in Texas, arranged for a real estate acquisition company with which he was affiliated to buy a house in Wyoming from the Wyoming Insurance Commissioner, Mr. Taylor. The only interstate act that Petitioner performed was arranging to wire funds from Texas to Wyoming incident to the purchase. Petitioner did not receive any benefit from Mr. Taylor.

In July, 1992, Petitioner was charged in a two-count indictment in the United States District Court for the District of Wyoming. Petitioner was indicted under (a) 18 U.S.C. § 371 for allegedly conspiring to violate the Travel Act in order to facilitate the bribery of a Wyoming state official; and (b) 18 U.S.C. § 1952(a)(3) & (b) for allegedly violating the Travel Act by facilitating the commission of bribery in violation of Wyo. Stat. § 6-5-102 (1977), and thereafter carrying on or facilitating the carrying on of bribery.[1] On November 13, 1990, the jury returned a guilty verdict on both counts. On February 13, 1991, the trial court sentenced Petitioner to serve concurrent terms of 27 months in prison as to each count.

Petitioner appealed his convictions to the United States Court of Appeals for the Tenth Circuit. On May 5, 1992, a panel of the court rendered an opinion reversing the conspiracy conviction on insufficiency of evidence grounds, yet affirming the Travel Act conviction.

In a case of first impression, the court analyzed the Wyoming bribery statute and held that a violation of the statute did not require a bilateral agreement between the briber and the bribee. Petitioner had argued below that because the Wyoming statute provides that a briber must confer value "in consideration for" an illicit act on the part of the public official, it follows that there must be an agreement between both parties to commit the alleged bribe. In short, Petitioner argued, the Wyoming legislature had carefully designed the statute to require a *quid pro quo* between the state official and the alleged briber in order to distinguish

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[1] It is worth noting that Petitioner was never indicted in Wyoming for bribery, nor was any federal "attempt" crime charged in the indictment. The government's entire case was predicated upon a single allegation of a criminal act—that Petitioner bribed Mr. Taylor by arranging to purchase his home.

criminal conduct, such as a bribe, from a non criminal act, such as a gratuity.

The Court then carefully reviewed each act that the government alleged in support of its argument that Petitioner had committed a bribe. The panel found each act to be insufficient even to support an agreement to commit a bribe between Petitioner and Mr. Taylor.

Notwithstanding its finding that no act of bribery occurred, the panel upheld Petitioner's Travel Act conviction on the basis that (1) the government did not have to prove a violation of the Wyoming bribery statute to secure a conviction under the Travel Act, and (2) Petitioner's "subjective intent," in the form of an expectation of some future benefit from the Wyoming official, was sufficient to support the Travel Act conviction. As a result of the court's subjective intent approach, Petitioner now stands convicted not for bribery under Wyoming law or for conspiracy to commit a bribe, but rather for having had an impure thought that Mr. Taylor might have treated him favorably in the future.

On July 7, 1992, the court denied Petitioner's Motion for Rehearing with Suggestion for Rehearing *En Banc* and modified the language of its initial opinion. The panel rendering the court's original opinion had refused to find error in the trial court's admission of certain extraneous evidence. The court stated that such evidence "may be relevant to Davis' state of mind and the carrying on of the alleged conspiracy" and rationalized that "because the evidence challenged was relevant, it could not have been unfairly prejudicial." Opinion of the Court of Appeals, p. 24 (*See* Appendix A, p. A-19). In the order denying Petitioner's Motion for Rehearing, however, the panel changed the quoted language to read: "Because the evidence challenged is relevant, it is admissible unless it is unfairly prejudicial. We conclude on the record it was moot." (*See* Appendix B, p. B-1.) The panel apparently took this approach because it

reversed the conspiracy conviction on insufficiency of evidence grounds even after it assumed that the challenged evidence was admissible. The panel failed to recognize, however, that such evidence, which would not even support a conspiracy count, likely "poisoned the well" when the jury considered the Travel Act count. Fortuitously, however, the court realized that it had misstated a fundamental evidentiary standard in its original opinion and "corrected" the error in the order denying Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

The Court of Appeals treated the "state crime" element of the Travel Act erroneously and in a manner that conflicts with other Courts of Appeals. In crafting its approach, the court misconstrued the proof necessary under the Travel Act to link a person's mental state to the commission of an underlying state offense. The Tenth Circuit's approach in this case directly conflicts with the decisions of at least five other Courts of Appeals with respect to the relationship between a state crime and a Travel Act violation. If the decision of the court below is allowed to stand, the Travel Act will be construed to encompass everyday, lawful activities, in direct contravention of public policy concerns.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND EXACERBATES THE CONFUSION SURROUNDING THE STATE CRIME ELEMENT OF A TRAVEL ACT VIOLATION.

Congress enacted the Travel Act in 1961 in an intensive effort to combat organized crime and racketeering. *Rewis v. United States*, 401 U.S. 808, 811 (1971). A Travel Act violation generally comprises three components: (1) the use

of interstate facilities; (2) the intent to commit an unlawful act; and (3) an act in furtherance of the illegal objective. 18 U.S.C. § 1952(a). The unlawful activity in the second component is defined under the statute to include several state law crimes, including bribery. 18 U.S.C. § 1952(b).

The legislative history of the Travel Act illustrates that Congress did not intend a Travel Act violation to be based solely on illegal thoughts:

> As originally drafted, the Travel Act's only requirement was travel in or use of a facility of interstate commerce with intent to commit one of the proscribed unlawful activities. No subsequent overt act was required. Consequently, one Senator commented that *the Travel Act created crimes out of pure intent* unaccompanied by subsequent action. In the final version of the Act, therefore, Congress included a requirement that the defendant must have committed an overt act in furtherance of the scheme.

Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 87th Cong., 1st Sess. 19 at 1028 (1961) (emphasis added). This passage confirms that Congress apparently thought that it had closed the "thought" crime loophole; Congress did not envision that the courts would circumvent its purpose by adopting a subjective intent standard, as the court below did in this case.

This Court, in *Rewis*, *supra*, acknowledged that the Travel Act "was aimed primarily at organized crime, and, more specifically, at persons who reside in one State while operating or managing illegal activities in another." *Rewis*, 401 U.S. at 811. The Court based its observation on the following testimony of the Attorney General before the Senate with respect to the Travel Act:

> American citizens who are not connected with organized gambling and organized crime have

> nothing to fear from these bills. The only toes tread on here are those of the racketeers and hoodlums.

Hearings Before the Senate Judiciary Comm., 87th Cong., 1st Sess. (S. 1653 and H.R. 6572) June, 1961. As the Court of Appeals for the Seventh Circuit has acknowledged, "Congress did not intend a broadranging interpretation of § 1952." *United States v. Peskin*, 527 F.2d 71, 77 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).

The Courts of Appeals have rendered markedly divergent opinions regarding the role of a state crime in the context of a Travel Act violation. Indeed, the courts have developed at least three approaches to the issue. First, some Courts of Appeals have maintained that proof that a state offense was or could have been committed is a necessary element of a Travel Act violation (an "element" standard). Second, several Courts of Appeals have held that a state offense merely serves a definitional purpose, and that it is not an essential element of a Travel Act violation (a "definitional" standard). Third, other Courts of Appeals have established an uneasy compromise between these two positions and have held that the government must show that the defendant engaged in an activity that was unlawful under state law. They have declined, however, to consider the commission of a state crime an element of a Travel Act offense. More importantly, they have not defined the level of "unlawfulness" the government must prove (an "intermediate" approach).

Moreover, the Courts of Appeals have from time to time abandoned their chosen standards and decided Travel Act cases in an unpredictable manner. The existence of several separate standards, as well as the courts' inconsistent application of those standards, should compel this Court to intervene in order to ensure the uniform application of federal laws.

A. THE FOURTH AND NINTH CIRCUITS' "ELEMENT" APPROACH: A STATE CRIME IS AN ELEMENT OF A TRAVEL ACT VIOLATION.

Several Courts of Appeals have stated that in order to establish the *mens rea* necessary to convict a person of a Travel Act violation, there must be proof that the accused violated or could have violated an underlying state law. In *United States v. Teplin*, 775 F.2d 1261, 1265, n.4 (4th Cir. 1985), the Court of Appeals for the Fourth Circuit held that the Travel Act requires a determination that a state law "has been or could have been violated." *Teplin*, 755 F.2d at 1265, n.4; *citing United States v. Loucas*, 629 F.2d 989, 991 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).[2]

The Court of Appeals for the Ninth Circuit has also concluded that the actual or possible commission of a state crime is an element of a Travel Act offense. *United States v. Bertman*, 686 F.2d 772 (9th Cir. 1982). The court held that "[t]he government must prove as part of the Travel Act charge that the defendant has or could have violated the underlying state law." *Bertman*, 686 F.2d at 774. *See also, United States v. Hiatt*, 527 F.2d 1048 (9th Cir. 1975). As a practical matter, the Courts of Appeals for the Fourth Circuit and the Ninth Circuit seem to require a detailed examination of the evidence that would support either the actual or potential commission of a state crime as an element of a Travel Act prosecution. Those courts have not, however, articulated the level of proof necessary to show that a person "could have violated" a state law.

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[2] In *Loucas*, the Court of Appeals for the Fourth Circuit added further confusion to the issue by embracing both an "element" and a "definitional" standard. The court stated that the existence of a state law crime is an element of a Travel Act offense, and that the court must determine whether the underlying state law has been or could have been violated. The court also stated, however, that the underlying state offense merely serves a "definitional" role in characterizing the conduct proscribed under the Travel Act.

B. THE FIFTH, SEVENTH, AND TENTH CIRCUITS' DEFINITIONAL APPROACH: THE UNDERLYING STATE OFFENSE MERELY SERVES A DEFINITIONAL PURPOSE AND IS NOT AN ELEMENT OF A TRAVEL ACT VIOLATION.

The Fifth, Seventh, and Tenth Circuits have adopted a second and contrasting approach. This approach, which the court below adopted in this case, relegates the predicate state offense to a merely "definitional" role. *See United States v. Prince*, 515 F.2d 564 (5th Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States v. Conway*, 507 F.2d 1047 (5th Cir. 1975). In *Prince*, the court explained: "[I]n § 1952 cases state law merely serves a definitional purpose. There is no need to prove a violation of the state law as an essential element of the federal crime . . . ." *Prince*, 515 F.2d at 566 (citations omitted).

The Court of Appeals for the Seventh Circuit also adopted a definitional approach in *United States v. Rizzo*, 418 F.2d 71 (7th Cir. 1969), *cert. denied sub nom Tornabene v. United States*, 397 U.S. 967 (1970). In *Rizzo*, the court held that an indictment is not required to allege either the elements of a state crime or that the intended unlawful objective was actually accomplished. Rather, the court concluded that "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *Rizzo*, 418 F.2d at 74. The Court of Appeals for the Seventh Circuit expanded this ruling beyond the context of indictments in *United States v. Karigiannis*, 430 F.2d 148, 150 (7th Cir.), *cert. denied sub nom Panagiotopoulous v. United States*, 400 U.S. 904 (1970), holding that "proof that a state law had actually been violated was not a necessary element of the offense."

In *United States v. Briggs*, 700 F.2d 408, 417 (7th Cir.), *cert. denied sub nom Schlacks v. United States*, 461 U.S. 947

(1983), the court stated that the defendants violated the Travel Act by traveling in interstate commerce with the intent to commit a state offense, regardless of whether they succeeded in committing the offense.[3]

In the instant case, as well as in previous decisions, the Court of Appeals for the Tenth Circuit has adopted a definitional approach. This position relies heavily on an earlier Tenth Circuit decision, *United States v. Hines*, 696 F.2d 722, 725 (10th Cir. 1982), in which the court held that the state law "merely serves a definitional purpose." In this case the court below reiterated its approach in *Hines*, finding that the state offense "serves a definitional purpose in characterizing the proscribed conduct." Opinion of the Court of Appeals, p. 9 (*See* Appendix A, p. A-7).

The court below has strayed from a definitional standard, however, both in this case and in a case decided after the one at bar. In *United States v. Bernaugh*, 969 F.2d 858, 866 (10th Cir. 1992), the court cited its decision in this case for the proposition that one of the elements of a Travel Act violation is an "attempt to commit or the actual commission of the proscribed activity." This approach constitutes an element standard. Thus, even the court below is confused about the proper approach to the issue at bar.

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[3] Interestingly, in an earlier case, *United States v. Zemater*, 501 F.2d 540, 544 (7th Cir. 1974), the Court of Appeals for the Seventh Circuit appeared to endorse an "element" standard, and stated:

> [The Travel Act's] plain language appears to require that the activity following the travel violates the law of the jurisdiction in which it occurs. The question we must decide is whether the travel . . . , and the prostitution which then occurred, constitutes a violation of the Illinois [statute] so as to come within the language of § 1952, as the indictment specifically charged.

Zemater, 501 F.2d at 544. The Seventh Circuit's failure to follow this decision exacerbates the confusion over the proper standard.

C. THE SECOND, SIXTH, AND EIGHTH CIRCUITS' INTERMEDIATE APPROACH: SOME FORM OF UNLAWFUL ACTIVITY IS REQUIRED TO SUSTAIN A TRAVEL ACT CONVICTION.

In *United States v. Goldfarb*, 643 F.2d 422 (6th Cir.), *cert. denied sub nom Tamer v. United States*, 454 U.S. 827 (1981), the Court of Appeals for the Sixth Circuit enunciated the elements of a Travel Act violation under an intermediate standard. In *Goldfarb*, the court concluded:

> It is abundantly clear that as a predicate to a Travel Act conviction, *the defendants must have engaged in some form of unlawful activity* prohibited by the law of the State of Nevada. This contention is beyond dispute and amply supported by the language of the Act and by the case law.

Goldfarb, 643 F.2d at 426 (emphasis added). The court also held, consistent with an element approach, that the state crime need not be actually accomplished. *Id.* In utilizing some components of an "element" approach, the court stated that a state crime plays some (greater than definitional) role in establishing a Travel Act violation. Nonetheless, the Court failed to enunciate clearly the requisite level of "unlawfulness" or proof necessary.

The Court of Appeals for the Second Circuit stated its interpretation of the requisites of a Travel Act violation in *United States v. Walsh*, 700 F.2d 846 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). The court held: "[A] Travel Act violation consists of interstate travel with intent to promote unlawful activity and thereafter some actual or attempted promotion of that unlawful activity." *Walsh*, 700 F.2d at 854. In an earlier decision, however, the court appeared to adopt an element standard, stating that "the initial inquiry in a Travel Act case is whether the underlying activity violates a state law." *United States v. Kahn*, 472 F.2d 272, 278 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

The Court of Appeals for the Eighth Circuit has also adopted an intermediate approach. In *McIntosh v. United States*, 385 F.2d 274, 276 (8th Cir. 1967), the court held that "consummation of the state substantive offense is not the indispensable gravamen of a conviction under section 1952." Thus, although recognizing the importance of the underlying state offense, the court declined to make it an element of a Travel Act violation.

In sum, the intermediate standard adopted by these courts embodies a nebulous and cryptic approach: some unlawful activity is required, yet it is unclear what degree of "unlawfulness" is required to support a Travel Act conviction.

D. THE COURTS HAVE NOT APPLIED THE VARIOUS STANDARDS UNIFORMLY.

It is troubling enough that seven different Courts of Appeals embrace widely divergent approaches to the relationship between state law proscriptions, the intent of the accused, the conduct of the accused, and the evidence necessary to prove a Travel Act violation. It is even more problematic, however, that even when courts recite one of the various standards, they usually abandon any pretense of following (or attempting to follow) the stated approach. None of the divergent decisions pronounces a method for determining the level of unlawfulness necessary for a Travel Act conviction where a state offense is the only element of criminality. The inconsistency in the courts' application of these standards further demonstrates the need for this Court to intervene and to enunciate the government's standard of proof in order to satisfy the "state crime" element of the Travel Act.

For example, the Court of Appeals for the Fifth Circuit expressly adopted a definitional approach in *Prince*. *See Prince*, *supra*, 515 F.2d at 566. Yet, in a decision thirteen

years after *Prince*, the same court reversed a Travel Act conviction, without reference to a definitional standard, based on a finding that the underlying state statute did not encompass the defendant's actions. *United States v. Tonry*, 837 F.2d 1281 (5th Cir. 1988). In *Tonry*, by acquitting the defendant on the ground that his action was not illegal under the state statute, the court clearly indicated the import —well beyond a mere definitional role—of the relationship between the commission of a state offense and the criminal state of mind necessary to support a Travel Act violation.

Similarly, the Court of Appeals for the Tenth Circuit departed from a definitional standard in *Hines*, *supra*. In *Hines*, the court stated that if a predicate state offense is based on an unconstitutional statute, a Travel Act conviction cannot be sustained. *Hines*, 696 F.2d at 725. In *Hines*, the court abated its decision pending the Oklahoma Court of Criminal Appeals' decision as to whether Oklahoma's gambling statute was constitutional. The court, while stating that the predicate offense serves only a definitional purpose, clearly recognized that if the state law were struck down, the underlying substantive conduct would not violate the Travel Act.

The Court of Appeals for the Sixth Circuit, which has also purported to use an intermediate approach, has held that an affirmative defense to a predicate state offense would compel acquittal on both the state law charge and a Travel Act count. *United States v. Stagman*, 446 F.2d 489 (6th Cir. 1971). Again, the court seemed to go well beyond the stated limits of an intermediate approach in determining the "unlawfulness" necessary to support a Travel Act violation.

The Court of Appeals for the Second Circuit, which has espoused an intermediate standard, has on occasion resolved the issue in a manner that resembles an element approach. In a case involving bribery under Pennsylvania law, the court found that a complete defense to a bribery

count would also act as a complete defense to a Travel Act count. *Kahn*, *supra*, 472 F.2d at 278. In other words, acquittal under the state law would compel acquittal under the Travel Act.

Finally, in a well-reasoned opinion in a factual situation similar to the one at bar, the Court of Appeals for the Third Circuit, which has adopted an intermediate standard, ascribed significant import to the necessity of proving the elements of the underlying bribery offense to support a conviction under the Travel Act. *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). The court carefully analyzed the appellant's activities under New Jersey law in determining whether he violated the Travel Act. The court deemed its thorough review of the state bribery statute and case law necessary to discern whether appellant's conduct was unlawful under the state bribery statute, which was, as in the instant case, the only element of illegality charged.

These cases serve to demonstrate the confusion surrounding the interplay between predicate state offenses and the Travel Act. The various standards and inconsistent applications illustrate the imperative need for this Court to intervene and to establish a uniform standard for the role of a state offense under the Travel Act.

II. THE SUBJECTIVE INTENT STANDARD APPLIED BY THE COURT OF APPEALS DENIGRATES FUNDAMENTAL LEGAL TENETS AND PUBLIC POLICY CONCERNS.

A. THE SUBJECTIVE INTENT STANDARD CRIMINALIZES EVERYDAY BUSINESS TRANSACTIONS CONDUCTED IN INTERSTATE COMMERCE.

The Court of Appeals for the Tenth Circuit has extended the scope of the Travel Act far beyond the intent of Con-

gress and the bounds of the Constitution. The court below held that the commission of a state offense was not a necessary element in a Travel Act case, and adopted an undefined "subjective intent" standard as the appropriate *mens rea* for conviction in such a case.

The court below relied on *United States v. Traitz*, 871 F.2d 368 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989), for the proposition "that only the briber's subjective belief that by conferring a benefit on the bribee, he would be the recipient of illicit gain" establishes a Travel Act violation. Opinion of the Court of Appeals, pp. 11-12 (*See* Appendix A, p. A-10). If the court below is correct, it will be impossible to separate the innocent act of buying a home in another state from a bribe. Under the court's analysis, any "impure" thoughts on the part of the buyer, coupled with the subsequent use of interstate facilities, would become an offense under the Travel Act.

1. The subjective intent standard impermissibly interferes with legitimate transactions in interstate commerce.

Under a subjective intent standard, virtually every commercial transaction could arguably violate the Travel Act. As discussed above, Congress specifically crafted the Travel Act in such a way as to avoid convictions based on thoughts alone. The following examples demonstrate how far the court below has strayed from the original Congressional intent, and how the departure clearly contravenes public policy.

For example, under the reasoning of the court below, the widespread practice of allowing a public official, such as a judge or a senator, to travel on a company plane to a corporate event could violate the Travel Act if the executive who arranged the trip had any "impure" thoughts of gaining favor with the official, or if the official had any thoughts of

being friendly to the company. Notably, under either scenario, no crime would have been attempted or completed. This example also illustrates the difficulties that courts applying a subjective approach will encounter; without resorting to mind reading, if will be difficult, if not impossible, to determine the thoughts of the accused in order to decide if he or she has violated the Travel Act.

The equally commonplace event of making a gift to a public official could be construed as a Travel Act violation under a subjective intent approach. For instance, a person who made a political contribution with an impure thought could be subject to prosecution under a subjective standard. One might seriously argue that all such contributions are made with the "hope of receiving a reciprocal benefit" in the future. For example, a lobbyist who sends fruit baskets to federal officials during the holiday season now risks being found guilty of a Travel Act violation. Surely the court below neither considered nor intended such far-ranging effects when it adopted a subjective intent approach.

2. The subjective intent standard allows for unfettered prosecutorial discretion.

Under a subjective intent standard, a prosecutor can indict one citizen at his or her whim, yet decline to indict another for the same act, depending upon his or her assessment of the citizen's thoughts. The court below has so broadened the scope of the Travel Act that abuse of prosecutorial discretion will be inevitable as prosecutors search in vain for some articulable rationale upon which to base their charging decisions.

A subjective intent standard provides such inadequate guidance as to proscribed activity that it violates the requirement that laws must provide explicit standards for those who apply them. *Grayned v. City of Rockford*, 408

U.S. 104, 108-09 (1972).[4] This Court explained in *Grayned* that such exactness is necessary in order to prevent the impermissible delegation of fundamental policy matters to "policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09. The Court's warning of these dangers in *Grayned* applies equally to the potential for unlimited prosecutorial discretion under a subjective intent standard.

If this Court allows a nebulous "subjective intent" standard to remain, it will permit an approach that will be dominated by limitless prosecutorial discretion—a regime in which a prosecutor's suspicion of a citizen's impure thoughts may result in indictment and conviction for both real and imaginary crimes. A subjective intent standard will detrimentally impact the accused, the jury, and the judicial system as a whole; it will also result in a court system encumbered by an inestimable number of inconsistent verdicts.

B. A SUBJECTIVE INTENT STANDARD ERADICATES TRADITIONAL *MENS REA* REQUIREMENTS.

The court of appeals contravened the authority of traditional criminal law and constructed a paradigm that allows conviction for merely thinking about activity that may be illegal. Other courts have avoided such a tenuous relationship between thinking about proscribed conduct and actu-

[4]Indeed, due process requires that every law must provide sufficient warning that certain conduct is proscribed. As this Court reasoned in *Grayned*: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 107.

ally engaging in it, and have therefore prevented "the very overexpansiveness which Congress sought to rule out by inclusion of an express *mens rea* requirement." *United States v. Gibson Specialty Co.*, 507 F.2d 446, 449 (9th Cir. 1974). *See also, United States v. Stanley*, 765 F.2d 1224, 1241-43 (5th Cir. 1985) (where defendant was convicted of aiding and abetting, the court required intent to carry on specified unlawful activity under Travel Act).

1. The *Mens Rea* Requirement.

A criminal conviction may not be supported by *mens rea* alone, since an *actus reas* is the cornerstone of the criminal law. As the Court of Appeals for the Ninth Circuit recently reasoned:

> *Mens rea* is generally required to convict a person for a crime, and where a statute does not clearly specify the mental state required for conviction, courts construe the ambiguity in favor of the defendant.

United States v. Ratzlaf, Nos. 91-10397 & 91-10429 (9th Cir. October 6, 1992); *citing United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978); *Rewis, supra*, 401 U.S. at 812. The court's approach in this case, however, ignores this tenet and allows subjective intent to subsume all other elements of the Travel Act. While courts have held that the presence of the intent element of an underlying state law suffices for the intent element of the Travel Act, the prosecution may not obviate *mens rea* and substitute subjective intent. *See United States v. Erlenbaugh*, 452 F.2d 967, 973 (7th Cir. 1971), *aff'd*, 409 U.S. 239 (1972). Because the decision below relies on a subjective intent standard that ignores the necessity of *mens rea*, it "runs counter to a fundamental concept that underlies our criminal justice system." *United States v. Washington Water Power Co.*, 793 F.2d 1079, 1082 (9th Cir. 1986).

2. **Petitioner's Conduct.**

It is well settled that the Travel Act requires the charged interstate activity to be linked to some alleged unlawfulness. *See United States v. Stanley*, *supra*, 765 F.2d at 1241. Here, however, Petitioner engaged in the completely lawful transaction of arranging for a company to buy a house at fair market value from a public official, without receiving any reciprocal benefit or an agreement to provide such a benefit from that official. With no conspiracy with a public official, no actual benefits conferred or requested, and no overt act other than a lawful real estate transaction, the conclusion is inexorable that there was no nexus between interstate travel and any unlawful activity. In sum, the only "unlawfulness" upon which the court below based the Travel Act conviction was a company's legal purchase of real estate, coupled with Petitioner's alleged impure hope that he might eventually receive some undefined benefit.

A person does not commit bribery simply by making a payment attended by a desire to obtain a more cordial atmosphere in the statehouse, even if (as was not the case with Petitioner) the statehouse regulates his business. As courts have uniformly emphasized under federal bribery statutes, paying money "with some generalized hope or expectation of ultimate benefit to the donor" or to promote "a favorable business climate" is not enough to prove a bribe. *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980); *United States v. Arthur*, 544 F.2d 730, 734-35 (4th Cir. 1976) (giving "goodwill" gifts and favors to government officials to establish a more favorable business climate in hope that officials will award more business to donor does not constitute bribery). The court below should have reached the same conclusion under the Travel Act.

3. ***Mens Rea* in the Context of Bribery.**

In order to establish *mens rea* in a Travel Act prosecution where the sole act relied on by the government is a lawful

commercial transaction, it is essential to analyze the underlying state statute. In this case, the Wyoming bribery statute defines bribery as conferring a pecuniary benefit on a public servant as consideration for the public servant's action in his or her official capacity. Wyo. Stat. § 6-5-102(a)(1) (1977). In order to secure a conviction under the Travel Act, the government should have proffered evidence that the purchase was a bribe under Wyoming law. This is especially true because all of the government's theories of the Petitioner's criminal culpability were predicated on bribery. If the purchase was not a bribe under Wyoming law, then there was no criminal offense for which Petitioner properly could be convicted, the Travel Act notwithstanding. *See Dansker, supra*, 537 F.2d at 47-51.

The court below seemed to suggest that a subjective intent to violate a state law and a subsequent overt act relating to interstate facilities is enough to support a Travel Act violation. At the same time, however, the court conducted a well-reasoned analysis as to why the government's theories of criminal culpability failed to establish a conspiracy. The same analysis also establishes that there was not a bribe under Wyoming law. Indeed, the trial judge observed that he might have dismissed the case if it had been a state bribery case. Nonetheless, the court below reasoned that the Travel Act conviction should be sustained because:

> The Government was not required to prove that Lloyd's US needed to relocate to Wyoming, only that Davis attempted to bribe a Wyoming public servant in hopes of obtaining a reciprocal benefit—apparently in this case a more favorable regulatory climate.

Opinion of the Court of Appeals, p. 22. (*See* Appendix A, p. A-17) The court then suggested that because Petitioner "hoped" that he could obtain some regulatory advantage in Wyoming in the future, he arranged for a company to purchase the house; that "hope" was enough to sustain a Travel

Act conviction. Opinion of the Court of Appeals, p. 22 (*See* Appendix A, p. A-18).

Under the approach established by the court below, neither Petitioner nor any other citizen could have been on notice that a seemingly innocent transaction in interstate commerce was a crime, even if there was some thought that the transaction would result in a future benefit. As this Court has long held:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Const. Co., 269 U.S. 385 (1926). A subjective intent standard does not establish the demarcation between innocent conduct and a criminal violation that Congress clearly envisioned when it passed the Travel Act. Such an expansive approach fails to meet minimum due process and will have a chilling effect on interstate commerce. By issuing a writ of certiorari, this Court can prevent the unfettered Travel Act prosecutions in seemingly endless fact patterns that will necessarily result from the lower court's decision.

CONCLUSION

The legal standard applied by the Court of Appeals for the Tenth Circuit in this case is in direct conflict with decisions in at least three other circuits. Furthermore, the disarray among the circuits as to the role of a state law violation under the Travel Act compels this Court to exercise its supervisory authority over the lower federal courts and to enunciate the appropriate standard. If the decision in this case is left standing, it will engender repeated and unlimited violations of due process and traditional requirements of criminal law that could potentially criminalize inestima-

ble numbers of everyday commercial activities in interstate commerce.

The Travel Act was appropriately passed by Congress to aid in the prosecution of interstate organized crime. Expansive judicial interpretations of the Travel Act such as that of the court below have broadened the statute far beyond the stated intent of Congress. This Court should set an appropriate *mens rea* standard that will not ensnare innocent citizens and convert ordinary commercial transactions into criminal acts. The Court should also review the government's use of this ever-broadening statute, especially in view of its legislative history and its potential for abuse.

For these compelling reasons, Petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.
ROBERT E. DAVIS,
Defendant/Appellant.

No. 91-8008

Appeal from the United States District Court for the District of Wyoming (D.C. No. CR-90-086B)

Charles W. Blau, (Denise Dumon, with him on the briefs), Dallas, Texas, for Defendant-Appellant.

Francis Leland Pico, Assistant U.S. Attorney, (Richard A. Stacy, U.S. Attorney and David A. Kubichek, Assistant U.S. Attorney, with him on the briefs), Cheyenne, Wyoming, for Plaintiff-Appellee.

Before McKAY, Chief Judge, and LOGAN, Circuit Judges, and SAM, District Judge.

SAM, District Judge.

Honorable David Sam, United States District Judge for the District of Utah, sitting by designation.

I. INTRODUCTION

Robert E. Davis (Davis) was convicted by a jury of conspiracy to use interstate commerce to facilitate the bribery of a public official in violation of 18 U.S.C. §§ 371 and 1952, and of use of interstate commerce to facilitate the bribery of a public official in violation of the Travel Act, 15 U.S.C. § 1952. The trial court sentenced Davis to 27 months imprisonment on both counts, to be served concurrently. Davis appeals his convictions.

II. BACKGROUND

The evidence, viewed in the light most favorable to the government, may be summarized as follows:

In August of 1985, Davis began an insurance business called Lloyd's U.S. It was licensed as a "Lloyd's Plan" insurer which denotes an unincorporated association of individual underwriters who undertake to insure risk purchasing groups (RPGs) on a "surplus lines" basis.[1] Davis' business was operating out of Dallas, Texas.

In the fall of 1986, Lloyd's U.S. was experiencing serious difficulties. Between August 7, 1986 and September 23, 1986, five states determined that they would no longer allow Lloyd's U.S. to conduct business within their bounda-

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[1] A RPG is an entity comprised of professionals or businesses that share similar risks and are unable to obtain insurance from carriers admitted to sell insurance in a given state. The businesses or individuals form an RPG to obtain insurance coverage from a carrier not admitted to sell insurance in that state. The coverage is known as a "surplus line" insurance. Federal law exempts RPGs from state regulation, except as such regulation may pertain to the RPGs' ministerial functions. 15 U.S.C. § 3903 (1982).

In order to write "surplus lines" insurance in a state in which the insurance company is not admitted, the insurance carrier must be licensed and admitted to some other state.

ries.[2] During the same time period, Lloyd's U.S. was under scrutiny in the state of Texas.

In August 1986, Gordon Taylor (Taylor), the Wyoming State Insurance Commissioner, contacted Davis to request that Lloyd's U.S. continue a medical malpractice policy for Casper, Wyoming's only neurosurgeon. In March of 1987, Taylor travelled with Kelly Davis, his deputy insurance commissioner, and others to Texas where he met with Davis to discuss the possibility of Davis expanding his business in Wyoming, particularly with respect to RPGs and medical malpractice risk retention groups.

In April 1987, Taylor was reappointed as insurance commissioner. Taylor's office was located in Cheyenne, which was 150 miles from his family and residence in Glenrock. Taylor lived in an apartment in Cheyenne during the week and would commute to Glenrock on the weekends. Because of the difficulty with this commute, Taylor put his Glenrock house up for sale. However, at that time the housing market in Wyoming was experiencing severe difficulties.

In April 1987, Davis, his business partner Jim Howard (Howard), and Davis' employee Michael DePaemelaere (DePaemelaere) attended the quarterly convention of the National Association of Insurance Commissioners (NAIC) held in Lexington, Kentucky. Taylor was also in attendance. One evening during the convention, Davis, Howard and DePaemelaere met with Taylor and others for dinner. In the course of their conversation, they discussed the prob-

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[2] The states which had "blackballed" Lloyd's U.S. included California, Utah, Illinois, Oregon and North Carolina. Appendix to Brief for Appellant (Aplt. App.) at 384. There is some evidence that the problems Lloyd's U.S. faced in those states were related to or caused by Lloyd's of London which, by virtue of a legal settlement, was ultimately required to pay Lloyd's U.S. several million dollars.

lems Taylor was having in selling the Glenrock house. DePaemelaere suggested that U.S. Fiduciary Trust Company, a company under Davis' direction that managed the RPGs, might be able to purchase the Glenrock house.

Within just a few days, Davis contacted Taylor by telephone and indicated he was interested in purchasing Taylor's house as an "investment." Taylor had listed the house at $100,000, but told Davis his asking price was $105,000. Taylor offered to secure another appraisal, which offer was declined. Davis knew at that time that the current housing market in Glenrock was depressed.

Davis discussed the proposed purchase with Howard who advised Davis that he could not legally purchase the house because Lloyd's U.S. could not carry real estate on its financial statement. Howard testified at trial that during the course of that conversation, Davis said "he was going to purchase that home because he needed help in Wyoming." Appendix to Brief for Appellant (Aplt. App.) at 867.

Davis made arrangements with Michael Patton (Patton) —a business associate of his—to purchase the Glenrock house. He told Patton that "he wanted to do [Taylor] a favor." Aplt. App. at 757. Davis also asked Patton to buy the Glenrock house without using Davis' name. Pursuant to Davis' instructions, Patton travelled to Wyoming to consummate the purchase. Taylor received a check for more than $60,000 from the transaction, which reflected his equity in the house. After Patton concluded the transaction he returned to Dallas where he met with Davis and told him, among other things, that he would likely lose thirty to forty thousand dollars on the Glenrock house. Patton testified to Davis' response "that he knew that he was going to lose 30 to $40,000 on the transaction." Aplt. App. at 769.

On May 5, 1987, DePaemelaere filed articles of incorporation in the state of Wyoming for United States Fiduciary

Company, an entity that would manage Davis' RPGs. Beginning on May 7, 1987, Davis caused nine separate RPGs to file notices of intent to do business with the Wyoming Department of Insurance.

In mid-1987, the Wyoming Department of Insurance, under the direction of Kelly Davis, formed a committee to draft regulations implementing the Wyoming Risk Retention Act of 1987 (Wyo. Stat. § 26-36-101 *et seq.* (1977 & Supp. 1991)). The committee consisted of Kelly Davis and two other representatives of the Wyoming Insurance Department; Manny Puebla, representing a risk retention group specializing in medical malpractice coverage; and Michael DePaemelaere, Drew Bagot (another Davis employee) and two of Davis' attorneys.

Taylor requested that Kelly Davis draft proposed legislation to permit the operation of "Lloyd's Plan" insurers in Wyoming, which legislation Taylor would sponsor during the 1988 legislative session. Before Kelly Davis attempted to draft such legislation he was contacted by appellant Bob Davis, who asked if he could have his lawyers draft the legislation. Kelly Davis responded affirmatively. Kelly Davis reviewed Bob Davis' proposed drafts of the legislation and deemed them unsatisfactory. Ultimately, Bob Davis' proposed legislation was never introduced at the legislative session.

On July 13, 1990, Davis was named in a seven count information along with Taylor and Roy E. Thigpen III and charged with conspiracy to violate the Travel Act. Following a severance, the information was dismissed and Davis was charged in a two-count indictment with conspiracy to violate the Travel Act (Count I) and violation of the Travel Act (Count II). Following a jury trial, Davis was convicted on both counts and sentenced to 27 months imprisonment on each count, which sentences were to be served concurrently.

III. DISCUSSION

Davis challenges his convictions on the following grounds: (1) the trial court erred in denying Davis' motion for acquittal based on misinterpretation of law and sufficiency of the evidence; (2) the trial court improperly allowed irrelevant and/or highly prejudicial evidence despite Federal Rules of Evidence 402, 403, and 404(b) objections; (3) the trial court improperly allowed the government to build its case on a theory not alleged in the indictment; (4) the instructions to the jury improperly framed the issues and misled the jury; and (5) sentencing on Count I under the United States sentencing guidelines was improper.

1. Denial of Motion for Acquittal

Davis challenges the court's denial of the motion for acquittal on both legal and factual bases. We review the legal challenges under a *de novo* standard. *United States v. Backas*, 901 F.2d 1528, 1530 (10th Cir.), *cert. denied*, 111 S. Ct. 190 (1990). However, the Court's review of the sufficiency of the evidence to uphold the conviction is conducted in the light most favorable to the government. *United States v. Peveto*, 881 F.2d 844, 860 (10th Cir.), *cert. denied*, 110 S. Ct. 348 (1989). If the jury's verdict of guilty is supported by substantial evidence, then the denial of a motion for acquittal will not be disturbed.

a. Legal Challenges

Davis was convicted under Count I for conspiracy to violate the Travel Act, 18 U.S.C. § 371, and under Count II for actual violation of the Travel Act, 18 U.S.C. § 1952. The Travel Act proscribes the use of interstate facilities in furtherance of illegal activity. The elements necessary for a successful prosecution under the Travel Act are: (1) travel or use of facilities in interstate commerce; (2) with intent to promote manage, establish, carry on or facilitate the promo-

tion, management, establishment, or carrying on of a prohibited activity—e.g., bribery; and (3) subsequent attempt to commit or actual commission of the proscribed activity. 18 U.S.C. § 1952 (1982).

Davis complains that the government was required to prove that he had committed the complete act of bribery before it could obtain a conviction on Count II, and that the government's failure to prove the existence of an agreement was grounds for acquittal.[3] According to Davis, Wyoming's law against bribery and, therefore, the Travel Act requires proof of the existence of an agreement between the briber and the alleged bribee.

Davis' argument is unpersuasive. Davis was convicted on Count II for violating the Travel Act, which prohibits persons from using an interstate facility to "facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." 18 U.S.C. § 1952 (1982). The Travel Act, by its express language, does not require the actual commission of the underlying state offense for conviction, but rather the use of interstate facilities in furtherance of the commission of the underlying state offense. *United States v. Hines*, 696 F.2d 722, 725 (10th Cir. 1982).

In *Hines*, we examined the Travel Act and concluded that a violation of state law is not an element of the Travel Act, but rather "serves a definitional purpose in characterizing

[3] Davis' legal challenges are directed at the district court's alleged misapprehension of the elements necessary to prove a Travel Act violation. Specifically, Davis challenges the failure to require proof of an agreement under Wyoming law. This challenge is directly relevant to Count II, which charged Davis with violating the Travel Act by facilitating the bribery of a public servant. Davis does not direct his challenge on this point to the conspiracy charge contained in Count I. Therefore, this portion of the Court's decision will focus on the elements necessary to prove a Travel Act violation and an interpretation of the Wyoming bribery statute.

the proscribed conduct." *Id.* at 725 (quoting *United States v. Loucas*, 629 F.2d 989, 991 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981)); *see also United States v. Barbieri*, 614 F.2d 715, 717 (10th Cir. 1980); *United States v. Pomponio*, 511 F.2d 953, 956 (4th Cir.), *cert. denied*, 423 U.S. 874 (1975). Therefore, the conviction under Count II did not require proof of the actual commission of bribery, but only that Davis had used interstate facilities in furtherance of his illegal objective. *United States v. Peveto*, 881 F.2d 844, 855-56 (10th Cir.), *cert. denied*, 110 S. Ct. 348 (1989).[4]

The illegal objective alleged in the indictment was Davis' bribery of a Wyoming public servant, Taylor, in violation of Wyoming law. The relevant Wyoming law provides:

> (a) A person commits bribery, if:
>
> > (i) He offers, confers or agrees to confer any pecuniary benefit, testimonial, privilege or personal advantage upon a public servant as consideration for the public servant's vote, exercise of discretion or other action in his official capacity . . . .

Wyo. Stat. § 6-5-102 (1977 & Supp. 1991).

Davis contends that the phrase "as consideration for" requires the charging party to prove that the alleged briber offered a pecuniary benefit pursuant to an *agreement* by the alleged bribee to reciprocate in some illicit manner. The Wyoming Supreme Court has not yet had an opportunity to determine whether the phrase "as consideration for" connotes the existence of an agreement between the briber and the bribee. The plain language of the statute does not necessarily require proof of a bilateral agreement and Davis does not provide any legislative history which would sup-

[4] Likewise, as to Count I, the government was not required to prove that the completed act of bribery had occurred, but only that Davis had conspired to use interstate means in furtherance of the prohibited act of bribery.

port his interpretation. Therefore, the Court will examine similarly worded legislation in order to determine whether the language "as consideration for" implies the existence of a bilateral agreement.

The Third Circuit interpreted two bribery statutes similar to Wyoming's in *United States v. Traitz*, 871 F.2d 368 (3rd Cir.), *cert. denied*, 110 S. Ct. 78 (1989), and held that the phrase "as consideration for" did not require proof of the existence of a bilateral agreement. In the *Traitz* case, Traitz and co-defendant Nuzzi challenged their convictions under the Travel Act on the basis that the government had not proven the existence of an agreement between the alleged briber and the alleged bribee. They had been charged with traveling from Philadelphia, Pennsylvania to Camden, New Jersey with the intent to bribe New Jersey officials, in violation of Pennsylvania and New Jersey's prohibitions on bribery. Both states' bribery statutes forbade persons from offering to confer any benefit "as consideration for" a public servant's exercise of discretion.[5] The *Traitz* court thoroughly examined the New Jersey and Pennsylvania bribery statutes and the comments to the

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[5] The relevant portions of both the Pennsylvania and New Jersey statutes follow:

> A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another . . . any pecuniary benefit *as consideration for* the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient. . . .

18 Pa.C.S. § 4701 (emphasis added).

> A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another . . . any benefit *as consideration for* a decision, vote, recommendation or exercise of discretion of a public servant, party official or voter on any public issue or in any public election . . . .

N.J.S.A. § 2C:27-2 (emphasis added).

Model Penal Code.[6] The court concluded that the phrase "as consideration for" did not require the existence of an agreement, but only the briber's subjective belief that by conferring a benefit on the bribee, he would be the recipient of illicit gain. *Id.* at 386.

In *United States v. Johnson*, 621 F.2d 1073 (10th Cir. 1980), this Court rejected appellant's argument for a *quid pro quo* requirement under the federal bribery statute set forth at 18 U.S.C. § 201(b) (1), stating:

> [I]t need not be shown that the public official to whom the bribe was offered was actually corrupted by the offer. It is not necessary to show that the official accepted the bribe, and the object of the bribe need not even be attainable to support a conviction for offering the bribe under § 201(b). *United States v. Jacobs*, 431 F.2d 754, 759-60 (2d Cir. 1970). In fact, so long as the money is offered

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[6] Comment 4(c) to the Model Penal Code § 240.1 provides the following relevant insight:

> The evils of bribery are fully manifested by the actor who *believes* that he is conferring a benefit in exchange for official action, no matter how the recipient views the transaction . . . . It is wholly appropriate, therefore, to view the action of conferring a benefit or accepting a benefit entirely from the point of view of the actor. If he meant to confer a benefit as consideration for official action or accept a benefit for that purpose, the offense of bribery is complete.
>
> . . .
>
> Each defendant should be judged by what he thought he was doing and what he meant to do, not by how his actions were viewed by the other party.

Traitz, 871 F.2d at 281 (quoting Model Penal Code § 240.1 comment 4(c) (Official Draft and Revised Comments, 1980)) (emphasis in original).

> with corrupt intent, the official does not necessarily even need to be aware of the bribe. 'The statute makes *attempted* bribery a crime, and so long as a bribe is "offered or promised" with the requisite intent "to influence any official act" the crime is committed.' *Id.* at 760.

Johnson, 621 F.2d at 1076 (emphasis in original).

The Court concludes that the district court applied the correct legal standard. Not only does Wyoming law *not* require evidence of a bilateral agreement between the briber and the bribee,[7] but such evidence would not be material to a conviction for violation of the Travel Act.

b. Sufficiency of the Evidence

The Court reviews a challenge to the sufficiency of the evidence by reviewing the evidence in the light most favorable to the prevailing party and drawing all inferences in that party's favor. *United States v. Nall*, 949 F.2d 301, 305 (10th Cir. 1991). If, in this case, there was sufficient evidence from which the jury could have found Davis guilty beyond a reasonable doubt, the denial of Davis' motion for acquittal will not be disturbed. In conducting this review, we are not permitted to weigh conflicting evidence or consider witness credibility as that duty is exclusively delegated to the jury. *Hines*, 696 F.2d at 730.

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[7] Davis contends that the trial court ruled on August 31, 1990 that it would require proof that the underlying offense of bribery had been committed. However, the district court's August 31, 1990 Order points out that the issue before the court was "the requirements of pleading" and that the order was *not* directed to the requirements of proof. Appellant's Appendix, Vol. I, p. 19. It is clear to this Court that the district court did not impose a requirement on the government to prove the existence of a bilateral agreement between Davis and Taylor, nor could the it have imposed such a requirement as such a requirement is not supported by law.

Davis challenges the sufficiency of the government's evidence with respect to both counts, alleging that the evidence before the district court proved that: (1) the committee formed to draft regulations was not formed to benefit Davis; (2) work on the Lloyd's Plan legislation did not benefit Davis; (3) Lloyd's U.S. did not need to relocate to Wyoming; (4) Taylor had no regulatory power over Davis' business and therefore could not have conferred a benefit upon Davis; and (5) Taylor never agreed to provide favors for Davis.

Count I

Count I charges Davis with conspiring with Taylor "and others unknown to the grand jury" to use interstate commerce to facilitate the bribery of a public official in contravention of 18 U.S.C. § 371.

The government must prove five elements to establish a conspiracy under 18 U.S.C. § 371: (1) an agreement; (2) to break the law; (3) an overt act; (4) the purpose of which is to further the object of the conspiracy; and (5) that the defendant entered the conspiracy willfully. *Nall*, 949 F.2d at 305. In *Nall*, we stated:

> The nature of a conspiracy, with its attendant aspects of secrecy, often requires that elements of the crime be established by circumstantial evidence. Nevertheless, the 'evidence of conspiracy—even if circumstantial—must be such as to establish beyond reasonable doubt defendant's agreement to or participation in a plan to violate the law.'

Id. (citations omitted). An essential element of a conspiracy is an agreement, or a "meeting of the minds [by the co-conspirators] 'in the common design, purpose, or objects of the conspiracy.' " *Id.* (quoting *United States v. Butler*, 494 F.2d 1246, 1249 (10th Cir. 1974)).

Davis' challenges to the sufficiency of the evidence are directly relevant to whether the government succeeded in proving that Taylor, the only alleged co-conspirator, had

agreed to conspire with Davis. Although Taylor was not on trial, his conduct is relevant to the existence of an agreement between alleged co-conspirators.

The evidence is undisputed that Davis and Taylor met for the first time in April at the NAIC convention, at which time Davis expressed an interest in buying Taylor's house. A few days later Davis and Taylor spoke by telephone and reached an agreement regarding Davis' purchase of the Glenrock house. Davis agreed to purchase the home for $105,000 despite his awareness of the depressed condition of the real estate market in the geographical area at that time and of Taylor's difficulties in selling the Glenrock house. The government does not allege that, in the course of these limited conversations, the parties formally agreed to exchange favor for favor. Rather, the government attempted to prove that the parties had arrived at a tacit agreement as evidenced by Taylor's conduct subsequent to Davis' purchase of the Glenrock house.

Our review of the record reveals only three bases on which the government attempted to create an inference that Taylor had entered into a conspiratorial agreement with Davis: (1) Taylor provided input into the composition of the committee formed to draft regulations implementing the Wyoming Risk Retention Act of 1987; (2) Taylor "intimidated" Kelly Davis with respect to the drafting of "Lloyd's Plan" legislation in Wyoming; and (3) Taylor did nothing "during the same time" Davis' business was being blacklisted in several other states. Brief for Appellee at 36.[5]

[5] In support of the conspiracy charge, the government also relied on the evidence that U.S. Fiduciary Company was formed as a Wyoming corporation on May 5, 1987, after which notices were filed with the Wyoming Insurance Department on behalf of nine RPGs organized to purchase surplus lines insurance from Lloyd's U.S. in Wyoming. Although these facts are relevant to Davis' intent, they do not implicate Taylor. While the RPGs were formed at the invitation of the Wyoming Department of Insurance, the evidence is uncontroverted that the invitation had been extended prior to the purchase of the house. Aplt. App. at 1067.

As to the first basis on which the government relies, it is noteworthy that the initial idea for the committee to draft regulations implementing the Wyoming Risk Retention Act of 1987 came, not from Taylor, but from Kelly Davis, the Deputy Insurance Commissioner. Kelly Davis approached Taylor for his input regarding membership of the committee to which Taylor replied, "Call Bob Davis." Aplt. App. at 571. The government contends that, because this directive led to a committee apparently weighted in favor of Davis, the jury could infer that Davis was illegally benefitting from Taylor's exercise of discretion.

Apart from directing Kelly Davis to Bob Davis, however, there appears to be no evidence that Taylor attempted to influence the composition of the committee. In fact Kelly Davis testified that he, not Taylor, decided the composition of the committee and issued the invitations to individuals selected. Aplt. App. at 566. Although the government places great emphasis on the fact that several individuals involved with Bob Davis were on the committee, Kelly Davis testified that he knew of only three individuals who were involved in the management of RPGs in the State of Wyoming and had tried to get all three on the committee. However, only two of the individuals were available, one of whom was Mr. DePaemelaere. Aplt. App. at 619. In light of these apparently uncontroverted facts, the evidence of Taylor's directive to Kelly Davis loses significance.

The second basis on which the government tried to create an inference that Taylor had conspired with Davis is Taylor's alleged intimidation of Kelly Davis in connection with the drafting of "Lloyd's Plan" legislation. Kelly Davis had been given the responsibility of preparing proposed legislation implementing the Wyoming Risk Retention Act, which legislation Taylor would sponsor during the 1988 legislative session. Kelly Davis testified that Bob Davis contacted him about preparing a draft of the "Lloyd's Plan" legislation. Davis had his lawyers draw up a proposal which was then submitted to Kelly Davis for review. Kelly Davis

testified in response to a question as to whether he felt intimidated *by Bob Davis*:

> I was receiving pressure from the insurance commissioner to get it done. He wanted to sponsor a bill. . . . I wasn't intimidated by Mr. Davis. I was intimidated perhaps by the insurance commissioner saying, 'Get it done.'

Aplt. App. at 629. While Bob Davis had his attorneys working on proposed legislation, the Legislative Service Office (LSO) was also working on potential legislation regarding RPGs. Kelly Davis testified that Taylor wanted "one of those bills", Aplt. App. at 630, and that when [Kelly Davis] "brought [the LSO legislation] to Taylor's attention . . . [Taylor] indicated that I no longer needed to work on the Lloyd's legislation submitted by Mr. Davis." Aplt. App. at 655.

Kelly Davis' testimony, when taken in context, does not support the government's characterization that Kelly Davis was being intimidated by Taylor because the proposed "Lloyd's Plan" legislation had been prepared by Bob Davis' attorneys. Brief for Appellee at 36. Although it appears that Taylor was anxious to have some kind of RPG legislation to sponsor during the upcoming legislative session, there is no evidence that Taylor exercised any influence in Davis' behalf. Therefore, Kelly Davis' indication that he felt intimidated by Taylor is insufficient evidence of a conspiratorial agreement between Davis and Taylor.

The remaining basis for the government's allegation of conspiracy is that Taylor failed to take regulatory action adverse to Lloyd's U.S. "during the same time when the Defendant's business was being blacklisted in several other states." Brief for Appellee at 36. The record is clear that the states which blacklisted Lloyd's U.S. did so from August to September of 1986—eight or nine months before Lloyd's U.S. even attempted to conduct business in the state of Wyoming. The record is devoid of evidence that the

blacklisting continued among any other states. Difficulties which Lloyd's U.S. experienced over a six week period some months prior to initiating efforts to conduct business in Wyoming do not provide a basis for the jury to infer that Taylor had agreed to stay his hand when, in fact, blacklisting by other states had not continued.

Finally, it appears that the government neglected to provide sufficient evidence that Taylor had agreed to the alleged conspiracy because the government did not consider such evidence a necessary element of its case. In its brief, the government boldly states that " 'consideration' in the form of a specific, agreed upon *quid pro quo* is not an essential element of the Government's proof with respect to either the conspiracy or the Travel Act counts in the indictment."[9] Brief for Appellee at 38.

The district court also seems to have been confused regarding the need for the government to provide evidence of an agreement. At the close of the government's case and in response to Davis' motion for acquittal on both counts, the district court stated that "the mere fact that Taylor wasn't called on to do anything doesn't mean that he wouldn't have." Aplt. App. at 242. The court concluded it would be appropriate to allow the jury to "infer" that Taylor would have used his influence in Davis' behalf if such a request had been made.

The Court, after a careful and thorough review of the record, concludes that the evidence before the jury was insufficient to support a verdict of guilty on the conspiracy count (Count I). While the evidence may have been sufficient to prove Davis' intent to bribe Taylor, the government did not prove beyond a reasonable doubt that there

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[9]The government goes on to state that, nevertheless, it has provided evidence of consideration referring to the representations we addressed above. That evidence, however, is insufficient to support a charge of conspiracy.

was a meeting of the minds between Davis and Taylor, the only other alleged co-conspirator. We reverse Davis' conviction on Count I.

Count II

A conviction under the Travel Act must be supported by proof that: (1) the appellant used interstate means (2) with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" (3) followed by performance or an attempt to perform the proscribed activities. *United States v. Peveto*, 881 F.2d 844, 860 (10th Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

Davis challenges the sufficiency of the evidence supporting the conspiracy conviction for the same reasons he challenges his conviction under Count I.

The first, second, fourth, and fifth alleged insufficiencies[10] incorrectly assume that evidence of an agreement is an essential element of the Wyoming law against bribery and thus a necessary element of a Travel Act violation. *See* discussion *supra* at 9-13. The remaining alleged insufficiency[11] likewise does not defeat Davis' conviction under Count II. The government was not required to prove that Lloyd's U.S. needed to relocate to Wyoming, only that Davis attempted to bribe a Wyoming public servant in hopes of obtaining a reciprocal benefit—apparently in this case a more favorable regulatory climate.

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[10]Davis' first, second, fourth, and fifth alleged insufficiencies are: (1) the committee formed to draft regulations was not formed to benefit Davis; (2) work on the Lloyd's Plan legislation did not benefit Davis; (4) Taylor had no regulatory power over Davis' business and therefore could not have conferred a benefit upon Davis; and (5) Taylor never agreed to provide favors for Davis.

[11]The third alleged insufficiency is that Lloyd's U.S. did not need to relocate to Wyoming.

The Court has reviewed the evidence produced by the government at trial and concludes that the evidence was more than sufficient to establish a violation of the Travel Act. Evidence submitted to the court reflects that Davis hoped he could obtain some regulatory advantage in Wyoming by purchasing the Glenrock house, Aplt. App. at 867, and that he was not adverse to spending as much as $40,000 in pursuit of this illegal objective, Aplt. App. at 769. Davis used interstate means to purchase the Glenrock house in a manner designed to conceal his ownership interest. He thereafter sought to do business in Wyoming and attempted to influence Wyoming legislation.

2. Evidentiary Objections

Davis charges that the trial court committed reversible error by improperly admitting evidence which was prejudicial to defendant, extraneous to the issues before the court, and violative of Rules 403 and 404(b) of the Federal Rules of Evidence. We review the admission of such evidence under the abuse of discretion standard. *United States v. Record*, 873 F.2d 1363, 1373 (10th Cir. 1989).

Davis challenges the government's introduction of evidence relevant to the alleged instability of Lloyd's U.S. including (1) evidence that Lloyd's U.S. had been blacklisted by five states in 1986; (2) alleged discrepancies in Lloyd's U.S.'s financial statements for 1985 through 1988; (3) an unfavorable June 1986 Texas audit report on Lloyd's U.S.; (4) evidence that Lloyd's had been placed in receivership by the Texas Department of Insurance in May 1990; and (5) a 1990 certificate of ineligibility issued against Lloyd's U.S. by the Wyoming Department of Insurance. Davis also challenges the introduction of evidence that Taylor had been the subject of a criminal investigation which ultimately resulted in Taylor pleading guilty in exchange for the government dropping several charges including charges that he

had conspired with and accepted a bribe from Davis. Aplt. App. at 1047.

Davis contends that the evidence of the instability of Lloyd's U.S. was inadmissible under Fed. R. Evid. 404(b) which restricts admission of evidence offered to prove character.[12] The challenged evidence, however, was not offered to prove Davis' character, and thus is not within the ambit of Fed. R. Evid. 404(b). Therefore, admission of such evidence only constitutes grounds for reversal if it was irrelevant (Fed. R. Evid. 402) or unfairly prejudicial (Fed. R. Evid. 403).

Evidence of instability of Davis' company was relevant to establishing whether Davis had a motive to bribe Taylor due to the struggle he was having gaining acceptance of his company in other states. The jury also may have viewed the alleged financial struggles as giving Davis reason to resort to bribery in order to obtain a favorable business climate.

Davis argues that the evidence that Lloyd's had been placed in receivership and that the Wyoming Department of Insurance had issued a certificate of ineligibility to Lloyd's was not relevant because both events postdate the inception of the alleged bribe. The government counters that such evidence is relevant to whether Davis may have continued to seek a position of influence over Taylor during the alleged ongoing conspiracy. The Court agrees with the government that such evidence may be relevant to Davis' state of mind and the carrying on of the alleged conspiracy. Because the evidence challenged was relevant, it could not have been unfairly prejudicial.

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[12]Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

Finally, Davis contends that the court committed reversible error when it allowed the government to elicit testimony from Taylor, the government's own witness, concerning a plea bargain in which charges of bribery and conspiracy with Davis had been dropped. The extent of his testimony concerning those charges was as follows: "One of those charges was based on, in this particular case, bribery and conspiracy, I believe, with Mr. Davis." Aplt. App. at 1047. Although the government did propound to the jury that Taylor had conspired with Davis in accepting a bribe, there appears to have been no other reference to the specific charges of bribery and conspiracy with Davis.[13]

Evidence of a co-conspirator's guilty plea is admissible for the limited purpose of assisting the jury in assessing the credibility of a witness. *United States v. Davis*, 766 F.2d 1452 (10th Cir.), *cert. denied*, 106 S. Ct. 239 (1985). However, such evidence is not admissible as substantive evidence of the defendant's guilt. *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983). To avoid such a result, we have cau-

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[13]The government, in its opening argument, alleged that Taylor had conspired with Davis:

> The evidence in this case, ladies and gentlemen, will show that Gordon W. Taylor, Junior was the Wyoming insurance commissioner for the State of Wyoming, a very responsible position, a position of trust . . . . Unfortunately, Mr. Taylor abused that trust and accepted bribes from several insurance officials, among them, Mr. Davis, and that's what the evidence in this case will show.
>
> The evidence will also show, and Mr. Taylor will tell you, that he has already pled guilty to a charge of bribery by another person not related directly to Mr. Davis. . . .

Aplt. App. at 185-186. Notably the government made no reference to the charges that were brought against Taylor and then dropped. However, such a statement would not be grounds for reversal in light of cautionary instructions given to the jury. They were instructed that the opening statement was not be considered as evidence. Aplt. App. at 266 and 1082.

tioned that the trial court should instruct the jury that the evidence of a witness' guilty plea is received for the very limited purpose of determining witness credibility and is not to be considered as implying the guilt of the defendant. *Davis*, 766 F.2d at 1456.

The court below gave the following limiting instruction to the jury at the conclusion of Taylor's testimony:

> Ladies and gentlemen of the jury, you have just heard that the witness, Gordon W. Taylor, was a defendant in a criminal case before this Court and that Mr. Taylor has entered a plea of guilty to a crime. This evidence of Mr. Taylor's, the plea of guilty, was admitted for a very limited purpose.
>
> Specifically, the evidence was admitted so that you may assess the credibility of Mr. Taylor as a witness as part of your duty in assessing the credibility of each and every witness that will appear in this case. Under no circumstances should the evidence of Mr. Taylor's guilty plea be used by you as any evidence of the guilt of the defendant, Mr. Robert E. Davis.

Aplt. App. at 1082. While this instruction properly informed the jury as to the weight to be accorded Taylor's guilty plea, the instruction did not inform the jury what weight should be accorded Taylor's testimony that the government had charged Taylor with conspiring with Davis and bribery. The jury, while understanding that Taylor's plea of guilty to accepting a bribe from Thigpen was not to be considered as evidence of Davis' guilt, could still have concluded that the evidence that Taylor had been charged with conspiring with Davis was relevant to Davis' guilt.

Davis, however, raised no objection to the cautionary instruction. Therefore this Court can only reverse the district court if the failure to give a more specific cautionary instruction "was so egregious as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Davis*, 766 F.2d at 1457.

We do not consider the introduction of the charges against Taylor to have resulted in a miscarriage of justice. There appears to be only the single passing reference to the charges and Taylor clearly indicated that those charges had been dropped by the government, thereby allowing the jury to infer that the charges may have been without merit. Moreover, Taylor denied having conspired with Davis. Under those circumstances, we cannot conclude that the failure of the cautionary instruction to refer to the dismissed charges constituted plain error. Therefore, we conclude that the introduction of the evidence that Taylor had been charged with bribery and conspiring with Davis was not unduly prejudicial. In any event, we have reversed the conviction on the conspiracy count, the only count on which Davis might have been prejudiced by Taylor's challenged testimony.

3. Alleged Variance Between Evidence and Indictment

Davis contends that he did not receive a fair trial because the evidence at trial varied from the allegations set forth in Count I of the indictment. Count I, which charged Davis with conspiracy, included allegations that Taylor had committed specific overt acts in furtherance of the alleged conspiracy. According to Davis, the district court allowed the government to proceed at trial under a new theory alleging a conflict of interest which caused Taylor to *refrain* from acting. Our reversal of Davis' conviction under Count I of the indictment renders this issue moot.

4. Challenges to Jury Instructions

Davis raises several challenges to jury instructions given by the district court on both Counts I and II. Because Count I has been reversed, we will only address the allegations of error pertaining to Count II.

In reviewing challenges to the jury instructions given by the district court, we do not review each instruction in iso-

lation, but review the record as a whole to determine whether the jury was provided with an accurate statement of the applicable law. *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988). The failure to instruct the jury as to a required element of the offense charged would mandate reversal. *United States v. O'Dell*, 462 F.2d 224, 232 (6th Cir. 1972); *United States v. Baltrunas*, 416 F.2d 401, 402 (10th Cir. 1969); *Findley v. United States*, 362 F.2d 921, 922 (10th Cir. 1966).

Davis first contends that the district court committed reversible error by not instructing the jury to find evidence of an agreement supporting the underlying bribery charge before they could find a violation of the Travel Act. The Court has thoroughly addressed that issue above and concluded: (1) that violation of state law is not an element of a Travel Act violation, but is referenced by the act for definitional purposes, *supra* at 9; and (2) that evidence of a bilateral agreement is not an element of Wyoming's law against bribery. *Supra* at 13.

Davis contends that under *United States v. Dansker*, 537 F.2d 40 (3rd Cir. 1976), *cert. denied*, 97 S. Ct. 732 (1977), the government may not obtain a conviction for violation of the Travel Act when the underlying offense is bribery unless the government is able to prove the existence of an agreement. In *Dansker*, co-defendant Serota appealed his conviction under the Travel Act for *accepting* a bribe in violation of New Jersey state law. The relevant statute proscribed persons from receiving money "to obtain . . . approval or disapproval . . . connected with or appertaining to any office or department of the government. . . ." *Id.* at 48 (quoting N.J.S.A. 2A:93-6). Serota had accepted a significant amount of money from individuals interested in obtaining a hotly contested zoning variance. In exchange, Serota agreed to cease his active opposition to their application for a zoning variance. The court of appeals concluded that there was no evidence that Serota agreed to corruptly influence the Board of Adjustment. *Id.* at 50.

Davis' reliance on *Dansker* is misplaced. Davis was convicted for violating the Travel Act through commission of bribery in violation of Wyoming law. Unlike Serota, Davis was the briber—not the bribee. Even New Jersey law does not require evidence of an agreement when the charged party is the briber. *Traitz*, 871 F.2d at 385-86.

Davis challenges Instruction 25, which tracked the language of the Travel Act and allowed the jury to find satisfaction of the third element if it concluded:

> that the defendant following such travel in interstate commerce or use of interstate facilities performed or *attempted* to perform acts of bribery by conferring a pecuniary benefit upon Gordon W. Taylor, Junior, insurance commissioner of the State of Wyoming in order to introduce (sic) Gordon W. Taylor, Junior, in a manner favorable to the defendant's insurance company, and that the defendant thereafter performed or *attempted* to perform the unlawful activities of bribery as alleged in the indictment.

Aplt. App. at 295 (emphasis added). Davis claims the district court's instruction to the jury that they could convict Davis for an "attempt" to violate the Travel Act constitutes a *de facto* amendment of the indictment.[14]

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[14]The indictment charges that Davis violated the Travel Act when he used interstate facilities:

> with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, said unlawful activity being bribery in violation of the laws of the State of Wyoming proscribing bribery of a public servant: to wit: § 6-5-102 Wyoming Statutes 1977 and thereafter did otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of an unlawful activity, that

(footnote continued on next page)

This contention is unavailing for two reasons. First, Davis submitted a proposed instruction to the district court which included the same contested language. Aplt. App. at 124.[15] The language of the indictment includes the charge that Davis "facilitate[d] the promotion, management, establishment, or carrying on, of . . . the bribery of Gordon W. Taylor, Jr." This language is broad enough to permit conviction for less than the completed act of bribery so long as there is evidence that Davis facilitated the carrying on of an unlawful activity. Such terminology encompasses the concept of attempt to commit a crime. Second, while the instructions to the jury indicated that the jury could convict on the basis of an attempt to violate the underlying state law, it also permitted the jury to convict based on an actual violation of the underlying state law. The evidence before the jury was sufficient to prove that Davis did, in fact, bribe Taylor in violation of Wyoming law. *See* discussion *supra* at 22. Accordingly, the Court finds no error in the district court's instructions to the jury.

5. Sentencing on Count I

Davis' final argument challenges the appropriateness of the district court's reliance on the federal sentencing guidelines in imposing a sentence for conviction under Count I. This issue is moot in light of the Court's reversal of Davis' conviction under Count I.

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is the bribery of Gordon W. Taylor, Jr., in violation of the aforesaid Wyoming statute.

Aplt. App. at 35-36.

[15]The government contends that we should review Davis' objections to the instructions under a stricter standard because Davis did not object to specific instructions at trial. However, Davis objected generally to the government's instructions. Aplt. App. at 253, which objection was renewed after the district court instructed the jury. *Id.* at 306.

IV. CONCLUSION

Having examined all of Davis' arguments and having reviewed all the relevant evidence, we REVERSE Davis' conviction on Count I and AFFIRM Davis' conviction on Count II. We REMAND to the United States District Court for the District of Wyoming for further proceedings consistent with this opinion.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff—Appellee,* v. ROBERT E. DAVIS, *Defendant—Appellant.*	No. 91-8008

ORDER
Filed July 7, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and SAM*, District Judge.

The Honorable David Sam, United States District Judge for the District of Utah, sitting by designation.

Upon consideration of appellant's petition for rehearing with suggestion for rehearing en banc, the panel of judges who rendered the decision amend the last sentence of the last full paragraph on page 24 of the court's opinion to read "Because the evidence challenged is relevant, it is admissible unless it is unfairly prejudicial. We conclude on the record that it was moot." The panel further denies appellant's petition for rehearing.

In accordance with Rule 35(b) of the Federal Rules of Appellate procedure, the suggestion for rehearing en banc was transmitted to the members of the panel and to all the judges of the court in regular active service. No member of the panel and no judge on the court in regular active service having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX C

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub.L. 87-228 § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212; Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.)

APPENDIX D

WYOMING STATUTES 1977
TITLE 6. Crimes and Offenses
CHAPTER 5. Offenses Against Public Administration
ARTICLE 1. Offenses by Public Officials

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Current through Ch. 6 of the Budget Session, approved 5-10-92

§ 6-5-102 Bribery; penalties.

(a) A person commits bribery, if:

(i) He offers, confers or agrees to confer any pecuniary benefit, testimonial, privilege or personal advantage upon a public servant as consideration for the public servant's vote, exercise of discretion or other action in his official capacity; or

(ii) While a public servant, he solicits, accepts or agrees to accept any pecuniary benefit, testimonial, privilege or personal advantage upon an agreement or understanding that his vote, exercise of discretion or other action as a public servant will thereby be influenced.

(b) Bribery is a felony punishable by imprisonment for not more than ten (10) years, a fine of not more than five thousand dollars ($5,000.00), or both.

(Laws 1982, ch. 75, § 3; 1983, ch. 171 § 1.)

Supreme Court, U.S.
FILED
DEC 31 1992
OFFICE OF THE CLERK

No. 92-774

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT E. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted under the Travel Act, 18 U.S.C. 1952, based on his violation of a state bribery statute.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 965 F.2d 804.

JURISDICTION

The judgment of the court of appeals was filed on May 5, 1992. A petition for rehearing was denied on July 7, 1992. On September 25, 1992, Justice White entered an order extending the time for filing a petition for a writ of certiorari to and including November 4, 1992, and the petition was filed on November 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of using interstate facilities to facilitate the bribery of a public official and conspiring to do so, in violation of 18 U.S.C. 371 and 1952. He was sentenced to 27 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals reversed his conspiracy conviction but affirmed his conviction under the Travel Act. Pet. App. A1-A26.

1. In August 1985, petitioner established an insurance business, which he called Lloyd's U.S. The business was a "Lloyd's Plan" insurer consisting of an unincorporated association of individual underwriters. In the summer and fall of 1986, five States barred Lloyd's U.S. from conducting further business within their boundaries, and by the fall of 1986, Lloyd's U.S. was experiencing severe economic difficulties. Pet. App. A2-A3.

In August 1986, Gordon Taylor, the Wyoming State Insurance Commissioner, contacted petitioner to request that Lloyd's U.S. continue a medical malpractice policy for the only neurosurgeon in Casper, Wyoming. Pet. App. A3. In April 1987, Taylor put his home in Glenrock, Wyoming, up for sale. In the same month, petitioner was attending a trade convention in Lexington, Kentucky, when he, his partner Jim Howard, and his employee Michael DePaemelaere had dinner with Taylor. During the dinner, Taylor told petitioner that he was having trouble selling his home. DePaemelaere suggested that U.S. Fiduciary

Trust Company, a company under petitioner's direction, might be able to purchase the house. Pet. App. A3-A4.

A few days later, petitioner telephoned Taylor and told him that he was interested in purchasing the house. Taylor told petitioner that he had listed the house at $100,000, but that his asking price was $105,000. Taylor offered to have the house appraised, but petitioner declined the offer and agreed to purchase the house for $105,000. Pet. App. A4, A13. Petitioner then discussed the proposed purchase with Howard, his partner, who told petitioner that the purchase was illegal because Lloyd's U.S. could not carry real estate on its financial statement. Petitioner replied that he intended to purchase the home "because he needed help in Wyoming." Pet. App. A4.

Petitioner arranged for a business associate to purchase Taylor's home without using petitioner's name. He told the associate that he "wanted to do [Taylor] a favor" and that he knew that he was going to lose $30,000 to $40,000 on the house. Pet. App. A4. Shortly after the purchase, petitioner caused nine insurance underwriting groups to file notices of intent to do business with the Wyoming Department of Insurance. In mid-1987, Taylor set up a committee to draft regulations implementing new Wyoming insurance legislation. Four of the eight members of the committee were associated with petitioner. In the same period, Taylor asked an aide to draft proposed legislation to allow "Lloyd's Plan" insurers to do business in Wyoming. Taylor was to sponsor that legislation in the Wyoming legislature. Petitioner

obtained the aide's permission for petitioner's attorney to draft the legislation. Petitioner submitted the draft legislation, but it was never introduced. Pet. App. A5.

2. On appeal, petitioner argued that to establish a violation of the Travel Act, 18 U.S.C. 1952, the government had to prove that he committed a completed act of bribery. Petitioner claimed that Wyoming law required proof of the existence of an agreement between the person offering the bribe and the person to whom the bribe was offered. Because, in his view, the government failed to show such an agreement, petitioner argued that the government had failed to establish a violation of the Travel Act.

The court of appeals rejected that claim. Pet. App. A6-A11. Instead, the court held that "[t]he Travel Act, by its express language, does not require the actual commission of the underlying state offense for conviction, but rather the use of interstate facilities in furtherance of the commission of the underlying state offense." Pet. App. A7. For that reason, the court ruled, the government had to show only that petitioner used a facility of interstate commerce in furtherance of the illegal objective of bribing an official. The court went on to hold that, in any event, Wyoming state law did not require proof of an agreement as an element of the offense of bribery. The court concluded that "[n]ot only does Wyoming law *not* require evidence of a bilateral agreement between the briber and the bribee, but such evidence would not be material to a conviction for violation of the Travel Act." Pet. App. A11 (footnote omitted).

The court also held that the government had presented sufficient evidence to support petitioner's conviction under the Travel Act.[1] In particular, the court rejected petitioner's claim that the government had to prove that he received a benefit in return for his purchase of Taylor's home. Instead, the court held that petitioner's Travel Act conviction could be upheld based on the government's proof that petitioner attempted to bribe a public official to obtain a benefit. Pet. App. A17.

ARGUMENT

Petitioner claims (Pet. 5) that the court of appeals "misconstrued the proof necessary under the Travel Act to link a person's mental state to the commission of an underlying state offense." Apparently, petitioner's contention is that the court of appeals erred in its statement (Pet. App. A7) that "[t]he Travel Act, by its express language, does not require the actual commission of the underlying state offense for conviction, but rather the use of interstate facilities in furtherance of the commission of the underlying state offense." That claim is wholly without merit.

To show a violation of the Travel Act, the government must prove that the defendant used a facility of interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," and that the

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[1] The court reversed petitioner's conviction for conspiracy to violate the Travel Act because it found that the government had not proved an agreement between petitioner and Taylor. Pet. App. A12-A17.

defendant thereafter committed or attempted to commit an act in furtherance of the unlawful activity. 18 U.S.C. 1952. The term "unlawful activity" in the Act is defined to include a number of state offenses, including bribery. See 18 U.S.C. 1952(b). Thus, as the court of appeals recognized, when the government charges a defendant with a violation of the Travel Act based on a predicate state offense, the plain language of the statute requires the government to prove that the defendant acted with the intent to promote the unlawful activity defined by state law, not that the defendant actually committed the unlawful activity.

Petitioner's contention to the contrary confuses the statutory requirement that the government prove that the defendant had the intent to promote an unlawful activity within the meaning of the phrase "unlawful activity" as used in the statute. Although the government does not have to prove that the defendant actually committed a violation of the state law that forms the predicate for a Travel Act offense, it must prove that the activity that the defendant intended to promote was unlawful under state law. See generally *United States* v. *Nardello*, 393 U.S. 286 (1969); see also *United States* v. *Jones*, 909 F.2d 533, 537 (D.C. Cir. 1990) (collecting cases). Put another way, to violate the Travel Act, a defendant must intend to perform, promote, or facilitate an activity that violates state law.

Petitioner suggests that the court of appeals departed from that principle. Petitioner further asserts that there is a conflict in the courts of appeals between those courts taking the view that petitioner ascribes to the court of appeals in this case and those

courts requiring proof that the defendant intended to promote activity that involves all of the elements of a predicate offense under state law.

Petitioner is wrong on both counts. First, the court of appeals did not suggest that the government could prove a violation of the Travel Act without establishing that petitioner intended to promote activity that was unlawful under state law. The court of appeals was careful to hold that petitioner's conduct actually violated the underlying state bribery statute. Petitioner's Travel Act conviction rested on his use of a facility of interstate commerce with the intent to commit bribery under Wyoming law. The Wyoming bribery statute provides that a person commits bribery if he "offers, confers or agrees to confer any pecuniary benefit, testimonial, privilege or personal advantage upon a public servant as consideration for the public servant's vote, exercise of discretion or other action in his official capacity." Wyo. Stat. § 6-5-102 (1977). The court of appeals examined the statute and held that it did not require proof that petitioner and Taylor entered into a formal agreement under which Taylor would use his regulatory authority on petitioner's behalf in return for petitioner's purchase of Taylor's house. Instead, the court held, petitioner's purchase for a loss of a house belonging to the Wyoming Insurance Commissioner in an attempt to obtain a favorable regulatory climate for petitioner's insurance business constituted a violation of the Wyoming statute.

Thus, the court of appeals found that petitioner had committed actions amounting to a violation of the Wyoming bribery statute. Accordingly, there is no

merit to petitioner's claim that the court of appeals upheld his conviction on proof less than that necessary to establish that he intended to commit or promote a violation of state law.

Although the courts of appeals have employed various formulations in describing the role of state law under the Travel Act, there is substantial unanimity in the courts' interpretation of that statute. Regardless of the language used, the courts agree that the government must show only that the defendant intended to promote an activity that is unlawful under a specific state law. See *United States* v. *Jones*, 909 F.2d at 537; *United States* v. *Arruda*, 715 F.2d 671, 681 (1st Cir. 1983); *United States* v. *Walsh*, 700 F.2d 846, 854-855 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Dansker*, 537 F.2d 40, 47 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States* v. *Goldfarb*, 643 F.2d 422, 430 (6th Cir.), cert. denied, 454 U.S. 827 (1981); *United States* v. *DeLuna*, 763 F.2d 897, 907 (8th Cir.), cert. denied, 474 U.S. 980 (1985); *United States* v. *Bertman*, 686 F.2d 772, 774 (9th Cir. 1982). Although some older decisions from the Fifth and Seventh Circuits suggested that the government did not have to prove that the defendant promoted conduct having all the elements of a state offense, see *United States* v. *Conway*, 507 F.2d 1047, 1051-1052 (5th Cir. 1975); *United States* v. *Rizzo*, 418 F.2d 71, 80 (7th Cir. 1969), cert. denied, 397 U.S. 967 (1970), more recent decisions from those circuits have adopted the majority view. See *United States* v. *Tonry*, 837 F.2d 1281, 1282 (5th Cir. 1988) (government must prove that defendant traveled in interstate commerce with the intent to

commit bribery, in violation of a specific state statute); *United States* v. *Zemater*, 501 F.2d 540, 544 (7th Cir. 1974) (activity that defendant seeks to promote must violate the law of the jurisdiction where it occurs).[2]

Petitioner also contends (Pet. 14-22) that the government's failure to show that he received any benefit in return for the purchase of Taylor's house allowed him to be convicted based only on that purchase coupled with his "subjective intent" to obtain a benefit from Taylor. As set forth above, however, the court of appeals found that petitioner's purchase of the house in an attempt to obtain favorable regulatory treatment from Taylor constituted a violation of the Wyoming bribery statute. Petitioner has not pointed to any decision by a Wyoming court that reaches a contrary result. Thus, contrary to petitioner's contention, his Travel Act conviction rests on his use of a facility of interstate commerce to commit a violation of Wyoming law, not on his mere purchase of a house.

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[2] Petitioner's elaborate effort to construct a tripartite scheme to categorize the approaches taken by the various courts of appeals mistakenly focuses on the language employed by the courts to characterize the role of state law under the Travel Act, and not on the results in those cases. Petitioner points to no case that suggests that another court of appeals would have reached a different result in his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-774

In the Supreme Court of the United States of America

OCTOBER TERM, 1992

ROBERT E. DAVIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

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SUMMARY OF REPLY

I. Respondent has been inconsistent in its position in this Court and in the courts below.

II. Respondent has ignored a pivotal issue.

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PETITIONER'S REPLY BRIEF

Petitioner Robert E. Davis files this Reply Brief to clarify the issues and prior proceedings in this case.

I. RESPONDENT HAS BEEN INCONSISTENT IN ITS POSITION IN THIS COURT AND IN THE COURTS BELOW.

Respondent's Brief demonstrates that the government has wavered as to the correct answers to the questions raised in Petitioner's Petition for a Writ of Certiorari. The issues in this case are (1) "the appropriate significance to be accorded to a predicate state law offense under the Travel Act," and (2) "the correct *mens rea* standard for conviction under the Travel Act." Respondent has taken a novel position on these issues in its Brief position that ignores the government's approaches in both the trial court and the court below. The government's new argument as to the elements of a Travel Act violation should compel this Court to intervene and to protect the due process rights of Petitioner and other citizens.

Petitioner has demonstrated that there are substantial differences among the appellate courts as to what elements the government must prove to sustain a Travel Act conviction where a state crime is the only charged predicate offense. Some of the appellate courts have held that proof of a violation of underlying state law is an "element" of a Travel Act violation, while others have stated that the state law serves a merely "definitional" purpose. Other courts of appeals have established an uneasy "intermediate" position that combines the first two standards.

Petitioner argued in the trial court, the court of appeals, and this Court that the element approach was the correct standard. Respondent previously argued that a completed state crime was not necessary to support a Travel Act conviction. The trial court and the court below addressed the issue on that basis. Respondent took the position for the first time in this Court that Respondent, the trial court, and the court of appeals all confirmed that Petitioner violated the Wyoming bribery statute. The record belies this position. Thus, we are left with a clouded standard for determining how the Travel Act may be violated.

A. Respondent has Misconstrued the Opinion Below.

In its Brief, Respondent declared to this Court that the court of appeals held that Petitioner actually violated the Wyoming bribery statute. Those contentions included the following:

1. "The court of appeals was careful to hold that petitioner's conduct actually violated the underlying state bribery statute."
   (Brief, p. 7)

2. The court below held that "petitioner's purchase for a loss of a house belonging to the Wyoming Insurance Commissioner in an attempt to obtain a favorable regulatory climate for petitioner's insurance business constituted a violation of the Wyoming statute."
   (Brief, p. 7)

3. "[T]he court of appeals found that petitioner's purchase of the house in an attempt to obtain favorable regulatory treatment from Taylor constituted a violation of the Wyoming bribery statute."
(Brief, p. 9)

Importantly, Respondent did not substantiate its conclusory assertions with citations to the record. A thorough review of the record confirms that there is no basis for the statements. In fact, the excellent analysis of the government's evidence by the court below to support its reversal of Petitioner's conspiracy conviction makes short work of any "completed bribery" theory. Respondent has now completely changed the thrust of its argument in a manner that is not supported by the record. This method is both inequitable and prejudicial to Respondent. This Court should intervene to ensure that Petitioner is treated in a more just manner.

B. Respondent has Misstated its Position in the Court Below.

Respondent stated in its Brief in this Court that the government proved that Petitioner committed a bribe. Respondent took the contrary position before the court of appeals. Indeed, Respondent contended at least seven times in its brief in the court of appeals that it did not have to prove that a bribe took place, and that Petitioner's assertions to the contrary were wrong. Respondent stated:

1. "[T]he Government did not bear the additional burden of demonstrating that the actual offense of bribery as defined by Wyoming law was in fact completed."
(Respondent's Brief on Appeal, p. 19)

2. "In this regard, it should be noted that the Travel Act count in the indictment does not allege that

the actual bribery of Taylor was accomplished . . . . Defendant's notion that he was somehow unfairly misled into believing the Government's case necessarily rested on proof of a completed or accomplished bribe is simply not supportable on this record."
(Respondent's Brief on Appeal, p. 19, footnote 18)

3. "Likewise, the Defendant's many references to the trial court's pretrial Order on motions as somehow 'requiring' the Government to prove a completed violation of the underlying state statute is also wrong."
(Respondent's Brief on Appeal, p. 19, footnote 18)

4. "[T]his court must judge the trial court's comment to the effect that, had he been judging this case based specifically on a charge of bribery under the Wyoming statute, he might have been inclined to grant the motion for acquittal."
(Respondent's Brief on Appeal, pp. 19-20)

5. "The trial court clearly understood that proof of the ultimate accomplishment of the offense of bribery as defined by state law was simply not required of the Government in the context of this Travel Act prosecution. As noted above, his understanding in that regard was correct."
(Respondent's Brief on Appeal, p. 20)

6. "[T]he Government's burden of proof with respect to a Travel Act charge does not include satisfaction of each and every element of the underlying state law violation . . . . "
(Respondent's Brief on Appeal, p. 20)

7. "§ 1952 does not require that the unlawful activity actually be accomplished . . . ."
(Respondent's Brief on Appeal, p. 46)

These assertions glaringly contradict the statements that Respondent has made to this Court that it actually proved a violation of the Wyoming bribery statute. Thus, it is reasonable to conclude that even Respondent is confused about the correct standards in this case. This Court should grant Petitioner's Application for a Writ of Certiorari to define the proper approach.

C. The Court of Appeals did not Hold That Petitioner's Conduct Actually Violated the Underlying State Bribery Statute.

Without citing to the record, Respondent has made multiple representations to this Court that the court below held that Petitioner actually violated the Wyoming bribery statute. In fact, the court of appeals specifically held that the government does not have to prove the violation of underlying state law in order to secure a conviction under the Travel Act. (Opinion of the Court of Appeals, Appendix A to Petition, pp. A-7, A-8, A-23.)

The central issue in this case is whether Respondent had to prove a violation of the Wyoming bribery statute to support its Travel Act offense, in light of the fact that the Wyoming bribery statute was the only underlying criminal offense charged. The government's entire case rested on the premises that Petitioner sent money in interstate commerce to effect the purchase of a home that belonged to the state insurance commissioner, and that the purchase was a bribe under Wyoming law. The indictment charged a violation of the Travel Act solely by way of a violation of the underlying state offense of bribery. The government opened and closed its case with the assertion that the purchase of Commissioner Taylor's home was a bribe. As confirmed by the opinion of the court below, the evidence completely failed to establish a bribe.

If Petitioner did not violate the Wyoming bribery statute, what offense did he commit? The purchase of a home, effected by an interstate wire transfer, in and of itself is not normally viewed as a criminal act. The court below suggested that all that is necessary to commit a Travel Act violation under these facts is that Petitioner must have had a "subjective intent" to bribe Mr. Taylor. Petitioner submits that such a standard is inappropriate under the facts of this case and under the language of the Wyoming bribery statute, which seems to suggest that to violate the statute, the briber and bribee must agree that the briber will give the bribee something of value, in a contemporaneous exchange for the bribee's vote or other action.

To prove bribery under Wyoming law, the government should have been required to prove that Petitioner gave Commissioner Taylor something of value as a specific *quid pro quo*. The Wyoming statute language literally requires proof that the offeror sought to influence some action "in consideration for" the public servant's vote, exercise of discretion or other action in his official capacity. Even the government's liberal use of circumstantial evidence occurring over a five-year period as a means of divining Petitioner's subjective intent failed to show evidence of a bribe—particularly in view of the fact that the government's own witness, the alleged bribee, testified that there was no bribe and that he never did anything for Petitioner.

The Travel Act has been judicially expanded far beyond the legislative intent that it only be used in organized crime cases. Justice Department officials testified that there was no danger that the Travel Act would ever be used against average citizens who were conducting legitimate business in interstate commerce. The legislative history of the Travel Act also demonstrates that Congress had substantial concerns that the statute would be too broad and that the government might be able to charge an offense based upon one's impure thought. Under the subjective intent analysis

set forth in the opinion below, it appears that if Petitioner had an "impure thought" in the form of an expectation of some undefined future benefit from Mr. Taylor when he purchased the house, the intent element under the Travel Act was satisfied. A subjective intent standard extends the scope of the Travel Act well beyond its Congressional mandate and poses serious due process issues. Congressional concerns over the creation of a crime based on impure thoughts appear to have been well-founded under the facts of this case, as an impure thought coupled with interstate activity supplies the only basis for conviction under the Travel Act. This case provides an excellent vehicle for this Court (1) to examine the "subjective intent" standard set forth by the court below, and (2) to resolve the muddled and inconsistent manner in which various courts of appeals have decided whether an underlying state crime is a necessary element of the Travel Act where it is the only substantive criminal offense charged.

The government has argued this pivotal issue in two opposite fashions that only serve to highlight the confusion over the elements of a Travel Act violation. Considerations of justice and fairness mandate that this Court prevent Respondent from arguing the issue both ways in the same case in two separate tribunals, especially when one of them is this Court. This Court should grant Petitioner's Petition for a Writ of Certiorari to resolve the inconsistency.

II. RESPONDENT HAS IGNORED A PIVOTAL ISSUE.

Respondent now contends that the court below held that Petitioner actually violated the Wyoming bribery statute. Respondent apparently has not recognized, however, that the court below reversed Petitioner's conviction for conspiracy to violate the Travel Act because the evidence was insufficient to support such a conviction. The reversal raises a critical question: If the evidence was insufficient even to

support a conspiracy to violate the Travel Act, then how could the evidence support the government's new position that it actually proved a bribe? The trial judge apparently had the same question, since he opined that if this case were a state bribery case, he would have dismissed it.

In short, what crime is committed where a person buys a house in interstate commerce and the government alleges, yet fails to prove, the only crime charged—that the purchase was a violation of the state bribery statute? The court below seemed to believe that Petitioner's purchase of the house with the expectation of some future benefit was sufficient to convict him under the Travel Act. The opinion below suggested that Petitioner's subjective intent was the appropriate standard for sustaining a conviction under the Travel Act. Respondent failed to address this critical issue. This Court should remedy the obvious infirmity in Petitioner's Travel Act conviction by granting his Petition for a Writ of Certiorari.

III. CONCLUSION.

Respondent has taken a novel position in this Court that is unsupported by anything in the record and is in fact inconsistent with the government's position in the courts below. As a result, issues raised by Petitioner remain unchallenged. Respondent's approach confirms that the manner in which the trial court, the court of appeals, and until now, the Respondent, addressed this case are insupportable.

Moreover, it appears that the government cannot decide how the Travel Act should be construed. If the government cannot adopt a consistent articulable position on the fundamental legal issues raised in this case, then it is difficult to envision how private citizens can be protected from prosecution under the subjective intent standard embodied in the opinion below. Petitioner asserts that there is now even more support for his Petition for a Writ of Certiorari.

Respectfully submitted,

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